IN THE IOWA SUPREME COURT

TIM NEAL,

Appellant,

vs.

ANNETT HOLDINGS, INC.,

Appellee.

Supreme Court No. 10-2117

APPELLEE-CROSS APPELLANT ANNETT HOLDING'S FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

APPEAL FROM THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY, THE HONORABLE KAREN ROMANO, No. CVCV8205

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CERTIFICATE OF FILING

The undersigned hereby certifies that she or a person acting on her behalf filed the attached Final Brief of Appellee-Cross Appellant by mailing eighteen (18) copies thereof on May 6, 2011, to the Clerk of the Iowa Supreme Court, Iowa Judicial Branch Building, 1111 East Court Avenue, Des Moines, Iowa, 52319, by depositing the same in the U.S. Postal Mail with sufficient postage affixed thereto.

Sandra L. Monthe

CERTIFICATE OF SERVICE

The undersigned certifies that on May 6, 2011, she or a person acting on her behalf did serve the attached Appellee-Cross Appellant's Final Brief on the other parties to this appeal by mailing two (2) copy thereof to the following party:

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CERTIFICATE OF COSTS

The undersigned hereby certifies that the cost of printing the attached Proof Brief of Appellee-Cross Appellant was 147.00.

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STATEMENT OF THE CASE

A. Nature of the Case

This appeal arises out of a workers' compensation claim involving injuries Tim Neal ("Neal") sustained on September 23, 2007 in the course of his employment with Annett Holdings, d/b/a TMC Transportation (hereinafter TMC), a Des Moines trucking company. The workers' compensation Arbitration Decision issued following an agency hearing found Neal suffered a 15 percent industrial disability as a result of the stipulated work injury. (App.171.) The Arbitration Decision further held that TMC properly suspended Neal's temporary healing period benefits pursuant to Iowa Code §85.33(3) due to Neal's refusal to accept light duty work offered by TMC. (App. 170.) Neal appealed the Arbitration Decision. The Appeal Decision found Neal suffered a 60 percent industrial disability and further held TMC was not entitled to suspend Neal's healing period benefits under Iowa Code Section 85.33(3). (App.196-97.) Thereafter, TMC petitioned for judicial review. (App. 211.) The Honorable Karen Romano issued a Ruling on November 23, 2010, reversing the commissioner's decision with regard to Iowa Code Section 85.33 and holding that TMC was entitled to suspend Neal's healing period benefits under that Code section because Neal refused suitable work. (App. 296-297.) However, the district court refused to overrule the

Commissioner's finding that Neal suffered a sixty (60) percent industrial disability. (App. 294-295.)

TMC requests this Court to uphold the district court's interpretation of Iowa Code Section 85.33(3) in finding TMC's light duty work program offered suitable work that Neal had no justification for refusing. For its cross-appeal, TMC requests that this Court reverse the district court's affirmation of the Commissioner's industrial disability award of 60 percent because the amount of the award is excessive, not supported by substantial evidence, and the reasoning supporting the award is not sufficiently explained.

B. Course of Proceedings

An arbitration hearing was held on February 23, 2009. (App. 5, Tr. p. 1.) Thereafter the presiding deputy, Deputy Rasey, issued an Arbitration Decision on June 19, 2009 holding that pursuant to Iowa Code §85.33(3), Neal forfeited his right to receive healing period benefits because he refused suitable work consistent with his disability. (App. 170.) Deputy Rasey found Neal had given "multiple and unclear" reasons for refusing the light duty work offered by TMC. (App. 170.) Deputy Rasey also held that Neal's shoulder injury caused a 15 percent industrial disability. (App. 171.) Deputy Rasey rejected Neal's claim for penalty benefits. (App. 171.)

Neal appealed the Arbitration Decision to the workers' compensation Commissioner. The Commissioner delegated the authority to decide the appeal and issue the final agency decision to Deputy Larry Walshire. (App. 190.)

Deputy Walshire issued his Appeal Decision on March 29, 2010,wherein he reversed the temporary disability determination and increased the industrial disability award from 15 percent to 60 percent. (App. 197.) As to the temporary disability issue, Deputy Walshire agreed with the hearing deputy that the light duty work offered to Neal was consistent with his disability, but nonetheless found the work was not suitable because TMC had not satisfied its burden of proving that the work was personally suitable to Neal. (App. 196.) Specifically, Deputy Walshire found:

> The presiding deputy obviously was not impressed with claimant's explanations for refusing the work. However, when healing period benefits, which are otherwise appropriate, are suspended, the burden is on the employer, not the worker, to show that work offered was suitable. (App. 196.)

Deputy Walshire held that because the work was located in Des Moines, and Neal lived in Illinois, the location of the work was not suitable. (App. 196.) Deputy Walshire rejected Neal's penalty claim. (App. 199.)

In response to the Appeal Decision, TMC filed a Motion for Reconsideration asserting, among other things, that in the absence of some meaningful explanation as to why there could be so much disparity between the amount of industrial

disability awarded by Deputy Rasey (15 percent) and Deputy Walshire (60 percent), with their decisions being otherwise largely identical in their analysis of the facts and the law, the final agency award was arbitrary, capricious and an abuse of discretion. (App. 201.) TMC's motion also requested an explanation as to why, on appeal, Deputy Rasey's credibility findings pertaining to Neal were not given any consideration even though it is standard, routine practice for the agency to do so on appeal. (App. 201-205.) TMC's motion also requested reconsideration of the ruling that Neal had not forfeited his right to receive temporary benefits pursuant to Iowa Code §85.33(3). (App. 201-205.)

In his Ruling on Reconsideration filed April 27, 2010, acting Commissioner Walshire denied TMC's motion, stating only:

> The only aspect I agree with in the motion for reconsideration is that I mislabeled the decision. The title of the decision in the caption is changed to "Appeal Decision." (App. 207.)

TMC then filed a petition for judicial review to the Polk County district court. (App. 211.)

C. Statement of Facts

At the time of his stipulated work-related shoulder injury, Neal was employed by TMC, a division of Annett Holdings, as an over the road truck driver. He was 45 years old and resided in southeast Illinois, on the border between Illinois and Indiana. (App. 10, Tr., p. 16). In connection with his employment at

TMC, Neal drove all over the country. His shoulder injury occurred on September 23, 2007 as he was picking up a load in Michigan. (App. 13, Tr. pp. 26-27.) While climbing onto a load of plywood lumber to secure a tarpaulin, Neal experienced a sharp pain in his right shoulder. (App. 13, Tr. pp. 26-27). An MRI scan on October 13, 2007, disclosed a partial full thickness tear, tendinopathy and thickening of the rotator cuff and hypertrophic changes of the AC joint. (App. 85.) Neal underwent arthroscopic shoulder surgery on March 11, 2008 by Dr. Glen Johnson. (App. 61.) He had a second surgery on June 25, 2008, consisting of an arthroscopic biceps tenotomy and distal clavicle excision. (App. 88-92.)

After the injury, but prior to his first surgery, Neal agreed to perform light duty work at TMC's headquarters in Des Moines. (App. 16, 22, 24, Tr. pp. 38, 64, 72-73.) Based on his verbal acceptance, TMC made arrangements to pick Neal up at his residence in Illinois and transport him to Des Moines. Neal was prepared to go. (App. 21, Tr. p. 59.) Neal, however, was not present when the driver arrived. He blamed it on a cell phone mix-up. (App. 16, Tr. pp. 38-39.) In a subsequent phone conversation, Neal advised Martha Grice ("Grice"), TMC's workers' compensation coordinator, that he did not want to do a particular part of the light duty work, consisting of safety lane checks, because he considered it "snitching" on other drivers. (App. 19, Tr. pp. 52-53.) Grice specifically advised Neal that if he did not come to Des Moines to perform light duty work, his TTD benefits

would be suspended. (App. 123, Neal Dep. p. 58.) As acting Commissioner Walshire found, "[a]t hearing, Neal offered a number of explanations and reasons why he did not make it to Des Moines, especially that 'they aggravated me' in a follow up telephone call with Grice." (App. 194; see App. 21, Tr. pp. 59-60.)

Neal then asked his physician, Dr. Johnson, for a release to full-duty driving and resumed his regular job. (App. 37, 161-64).

After the March 11, 2008 surgery, Dr. Johnson released Neal to return to work on a temporary basis with restrictions. (App. 140.) When TMC was informed that Neal was able to perform light duty work as of March 20, 2008, Grice contacted Neal by way of certified letter. (App. 154-155.) This letter clearly outlined what pay he would receive, his work assignments, and transportation and lodging arrangements. (App. 154-155.) The letter also explained to Neal that his refusal to accept the light duty job offer would result in suspension of his TTD benefits, for the period of his refusal. (App. 154-155). Just as he had refused TMC's offer of light duty work in September 2007, Neal again refused light duty work in March 2008. (App. 25-26, Tr. pp. 76-78).

As found by both Deputy Rasey and acting Commissioner Walshire,

> Neal resides in southeast Illinois, very close to the Indiana state line. Dr. Johnson's office, including a physical therapy department, is located in Evansville, Indiana, approximately fifty miles away. Annett Holdings owns a motel located in Des Moines, Iowa; this is frequently used by drivers, and in particular, is used to house injured drivers

during recovery. Neal was offered light duty work and physical therapy services while recuperating in Des Moines, but did not do so, resulting in suspension of his healing period benefits (effective April 1, 2008) and a significant dispute in this claim.

Annett Holdings maintains a regular physical therapist for on-site therapy, and the motel features a fitness room, examination room, and swimming pool. Drivers performing light duty work are furnished transportation home every other weekend; travel time does not count as weekend time. On March 26, 2008, after the first surgery but before the second surgery, Neal was offered sedentary work on this basis by certified mail. (Ex. 9, p. 2) He did not accept, and benefits were suspended effective April 1, 2008.

By way of history: shortly after the injury in September 2007, Neal had been offered light duty work and transportation to Des Moines, but apparently due to communications problem (a cell phone "dead spot" or, just as likely, his refusal to communicate), he was not picked up by the assigned driver. He thereafter asked Dr. Johnson for a release to full duty driving, and resumed his regular job. At hearing, Neal offered a number of explanations and reasons why he did not make it to Des Moines, especially that "they aggravated me" in a follow up telephone call with Grice.

Following surgery, Neal had another conversation with Grice, but by now the relationship was clearly poisoned. Neal claims that he did not accept the light duty work because he needed to sleep in a recliner, but did not ask if he could be provided with one. In deposition testimony given November 5, 2008, Neal testified:

Q. Did you ever indicate at all to TMC that you'd be willing to come back so long as they could accommodate what you needed in order to insure the greatest comfort that you had due to your surgery?

A. No.

Q. Is it you testimony that if they would have said, "Tim, we'll make sure that whatever overnight accommodations you have at home, we'll make sure that they're similar ones here at the hotel that we have here," would you have come back?
A. No.
Q. Would you have come back if they'd made that offer to you?
A. No.
Q. Why not?
A. Because I wasn't going to put myself through that. I wasn't going to put myself through all that pain and all that agony and getting away from my doctor, who was taking care of me, to go up to a strange land in a strange place, let somebody else take care of me who has nothing - - knows nothing about my shoulder, stay in a hotel room with two other grown men I don't even know in a bed in the corner and laying -- have to fight myself through this whole ordeal just so I can come up there and answer a phone. It made no sense to me.

(App. 21, 23; Tr. pp. 59-60, 67-68).

On September 6, 2008, Dr. Johnson signed a statement drafted by Neal's attorney, indicating that it would be "ludicrous" for Neal to attend therapy in Des Moines, rather than with a therapist associated with him. (App. 68.) This opinion postdated Neal's refusal to accept light duty work, and was therefore not a reason for the refusal. (App. 167-168, 193-195.)

Deputy Rasey and acting Commissioner Walshire both also found:

> Since Neal's injury, he and Annett Holdings have been at loggerheads over the issue of light duty employment in Des Moines. In September 2007, Neal agreed to come to Des Moines, but due to communications problems of unclear

> origin failed to be picked up by an assigned driver. Trial testimony dealt with this issue in great detail. Neal has offered a number of explanations, including the alleged failure to call him at his home phone number (a "landline") rather than by cell phone, his characterization of some light duty work as "snitching" on fellow drivers, and alleged disrespect shown him by Grice when they finally did talk by telephone. In any event, Neal obtained a temporary full-duty release from Dr. Johnson and continued working until his March 2008 surgery — but the stage was clearly set for continuing dispute.
>
> Neal's reasons for refusing light duty work in Des Moines in March 2008 are also multiple and unclear. He wanted a recliner for sleeping, but did not make that known to Grice. Presumably, he was still opposed to "snitching" on other drivers. He wanted to continue therapy at Dr. Johnson's office, even though each session (once weekly for physical therapy; thrice weekly for eventual work hardening) entailed a 100-mile round trip drive from home. He would get home only every other weekend, rather than every weekend as he did when driving truck. When asked specifically by the presiding deputy, he described living "in a strange land" as a likely "ordeal." Considering the evidence as a whole, the finder of fact believes he simply wanted things his own way and refused to cooperate with his employer's ongoing program for injured drivers.

(App. 170, 195-196.)

On January 26, 2009, Dr. Johnson released Neal to return to work with restrictions of no lifting over 40 pounds from floor to waist, no lifting over 15 pounds from floor to overhead, and no repetitive lifting of lesser weight with the right arm. (App. 81). These activity restrictions were derived from a Functional Capacity Evaluation ("FCE") accomplished on November 8, 2008. (App. 81, 94.)

The FCE study found Neal had the physical capacity and tolerance to function between the U.S. Department of Labor categories of light-medium and medium work. (App. 93.) The FCE described no limitations on carrying, pushing/pulling, climbing, sitting, standing or walking. (App. 95.)

David T. Berg, D.O., performed an independent medical examination at TMC's request and issued a report dated November 11, 2008. (App. 97.) Dr. Berg rated Neal's permanent impairment at 2.5 percent of the upper extremity, rounded to three percent convertible to two percent of the whole person, and concluded:

> Mr. Neal has reached MMI [maximum medical improvement] based on this examination, dated 11-6-08, for the reasons stated above. This date would be as expected and in accordance with Dr. Johnson's note of 10-23-08.
>
> There is no objective evidence that would support work or activity restrictions following Mr. Neal's right shoulder injury of 9-13-07 and subsequent treatment. Mr. Neal is physically capable of returning to work as a driver for TMC or any other similar company. He would need to follow common sense changes in his activity based on his shoulder injury and lumbar fusion no matter what activity he participates in. At the time of this examination Mr. Neal continued to require Talwin NX to control his chronic low back pain. This fact alone would disqualify him from DOT certification.

(App. 103.)

TMC continued to offer light duty work to Neal but he was not interested in returning to work for TMC. (App. 25-26, Tr. pp. 76 -78.) According to Neal, he did not want to work for TMC anymore because he no longer wanted to work in a

job, like truck driving, that required him to be on the road and away from home all of the time. (App. 119, Neal Dep. pp. 42-43.) Up to the time of hearing, Neal had not returned to any kind of work and he had done nothing to try to find work until a few weeks before the hearing. (App. 110, Neal Dep. p. 8; App. 105.)

Neal underwent surgery in the mid 1990s after rupturing two disks in his lower back. He lost his job as a construction project superintendant after that. (App. 12, Tr. p. 23.) He continues to take narcotic pain medication for his back symptoms. (App. 16-17, 19-20, Tr. pp. 41-42, 53-54.) Prior to starting work as a truck driver for TMC in 2000, Neal had been employed as a project superintendent for eight years. (App. 12-13, Tr. pp. 25-26.) Neal's earlier employment history included work as an oil field pumper. (App. 17-18, Tr. pp. 45-46.)

ROUTING STATEMENT

This case involves an issue of first impression and should be retained by the Iowa Supreme Court pursuant to Iowa Rule of Civil Procedure 6.401.

ARUGMENT

A. Standard of Review

In its review of workers' compensation decisions, the Court is to apply the standards of judicial review set forth in the Iowa Administrative Procedure Act (Iowa Code Chapter 17A). Bell Bros. Heating v. Gwinn, 779 N.W.2d 193 (Iowa 2010). "Under the Act, "[the district court] may only interfere with the

commissioner's decision if it is erroneous under one of the grounds enumerated in the statute, and a party's substantial rights have been prejudiced." Meyer v. IBP, Inc., 710 N.W.2d 213, 218 (Iowa 2006). When this Court reviews the district court's decision, it applies the standards of Chapter 17A "to determine whether the conclusions it reaches are the same as those of the district court. If they are the same, this Court affirms; otherwise, the Court reverses. Mycogen Seeds v. Sands, 686 N.W.2d 457, 464 (Iowa 2004).

The Court's review of an agency's decision is for correction of errors at law. Simonsen v. Snap-on Tools Corp., 588 N.W.2d 430, 434 (Iowa 1999). The Court's role as an appellate court reviewing the agency decision is threefold: (1) to determine if the commissioner applied the proper legal standard or interpretation of the law; (2) to determine if there was substantial evidence to support the commissioner's findings; and (3) to determine if the commissioner's application of the law to the facts was irrational, illogical, or wholly unjustifiable. Clark v. Vicorp Rests., Inc., 696 N.W.2d 596, 603-04 (Iowa 2005).

1. Agency Findings of Fact

"If the claim of error lies with the agency's findings of fact, the proper question on review is whether substantial evidence supports those findings of fact" when the record is viewed as a whole. Meyer, 710 N.W.2d at 219. The Commissioner's fact findings must be supported by substantial evidence in the

record as a whole. Meyer, 710 N.W.2d at 218. Substantial evidence is defined as evidence of the quality and quantity "that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance." Iowa Code §17A.19(f)(1); Mycogen Seeds v. Sands, 686 N.W.2d 457, 464-65 (Iowa 2004). Thus, evidence is substantial when a reasonable person could accept it as adequate to reach the same finding. Asmus v. Waterloo Cmty. Sch. Dist., 722 N.W2d 653, 657 (Iowa 2006).

2. Agency Application of Law to Fact

Where an issue is raised regarding the application of the law to the facts, the court is to reverse if the commissioner's application was "irrational, illogical, or wholly unjustifiable." Iowa Code §17A .19(10)(l); Mycogen Seeds, 686 N.W.2d at 465. The court gives some deference to the commissioner's determination, but less deference than is given to the commissioner's findings of fact. Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 842, 850 (Iowa 2009).

3. Agency Interpretation of Law

In contrast, the commissioner's interpretation of the law is entitled to no deference because " '[t]he interpretation of the workers' compensation statutes and related case law has not been clearly vested by a provision of law in the discretion of the agency.'" Lakeside Casino v. Blue, 743 N.W.2d 169, 173 (Iowa 2007)

(quoting Finch v. Schneider Specialized Carriers, Inc., 700 N.W.2d 328, 330 (Iowa 2005)). Therefore, the Court does not defer to the agency's interpretation of the law. Id.; see also Iowa Code §17A.19(10)(c).

B. THE DISTRICT COURT CORRECTLY HELD THAT THE AGENCY ERRED IN INTERPRETING AND APPLYING IOWA CODE §85.33(3) TO THE FACTS OF THIS CASE.

The Commissioner's decision as to temporary disability benefits was properly reversed by the district court because the Commissioner incorrectly interpreted §85.33(3) to the detriment of TMC. That Code section provides, in pertinent part:

> If an employee is temporarily, partially disabled and the employer for whom the employee was working at the time of injury offers to the employee suitable work consistent with the employee's disability the employee shall accept the suitable work, and be compensated with temporary partial benefits. If the employee refuses to accept the suitable work with the same employer, the employee shall not be compensated with temporary total, or healing period benefits during the period of refusal.

As set forth in the Appeal Decision, the acting Commissioner held that the light duty work was not suitable because it was located in Des Moines and Neal resided in southern Illinois. (App. 196.) The acting Commissioner's conclusion was an error of law that the district court appropriately corrected.

Since the interpretation of workers' compensation statutes and related case law has not been clearly vested by a provision of law in the discretion of the workers' compensation commissioner, courts give the commissioner's

interpretation of the law no deference and are free to substitute their own judgment. Lakeside Casino v. Blue, 743 N.W.2d 169 (Iowa 2007). The district court was free to substitute its own judgment as to the correct interpretation of Iowa Code §85.33(3), and this Court should further uphold the district court's interpretation.

The district court provided the following analysis of the issue:

> Deputy Walshire's definition of "suitable work" is not consistent with the statute's definition of "suitable work" and is therefore in error. The statute does not define "suitable work" in terms of its location; rather, "suitable work" is that which is "consistent with the employee's disability." (citations omitted). Here, although Deputy Walshire's decision is nearly devoid of any discussion of modified duty or adherence to work restrictions, there is no indication that the work offered by Annett Holdings did not comply with Neal's work restrictions. Deputy Walshire found the work offered by Annett Holdings to be "light-duty work" and "sedentary work" and did not appear to dispute Deputy Rasey's statement that "[n]othing about the light duty work itself appears unsuitable other than the location in Des Moines." Deputy Walshire erred in interpreting and applying Iowa Code section 85.33. Because Neal refused suitable work within his restrictions, Neal forfeited his right to receive temporary partial, temporary total, or healing period benefits during the period of refusal. (citations omitted.)
>
> Furthermore, even considering the "other factor" (i.e., the location of the work relative to Neal's home), the facts do not show that the work was unsuitable. The facts indicate that Annett Holdings would provide housing in Des Moines to Neal; that Neal would receive treatment for his injuries in Des Moines; that Annett Holdings would provide Neal with transportation home every other weekend; and that travel time does not count as weekend time. Also, prior to Neal's injury, he had been an over-the-road truck driver and had been home each weekend (rather than every other weekend). In sum, there is no

indication that temporarily working and living in Des Moines would pose physical or economic issues for Neal. (App. 296-297.)

As found by the district court, the Commissioner erred in defining "suitable work" to mean work that is acceptable to Neal. (App. 296.) The statute does not define "suitable work" in this manner. (App. 295); Iowa Code §85.33. Suitable work is set forth in §85.33 and means "work consistent with the employee's disability. . . ." Iowa Code §85.33. In other words, work is suitable and must be accepted by the recovering worker if it meets the restrictions imposed by a health care provider treating the worker. See McCormick v. North Star Foods, Inc., 533 N.W.2d 196 (Iowa 1995). Section 85.33 does not also require the injured worker to be happy with the location, hours, pay, etc. Iowa Code § 85.33.

Pursuant to Iowa Code §85.33(3), the proper analysis is: (1) whether the employee was offered suitable work, (2) which the employee refused. If so, benefits can be suspended. Schutjer v. Algona Manor Care Center, 780 N.W.2d 549, 559 (Iowa 2010). In Schutjer, the Iowa Supreme Court concluded the employer offered suitable work to the injured worker by virtue of the fact that the employer was accommodating the worker's modified duty restrictions. Id. at 559. The recovering worker was held not to be entitled to temporary benefits during the period of her refusal of this work. Id.; see also McCormick, 533 N.W.2d at 197.

At hearing, Ms. Grice testified in depth about TMC's light duty program. It has been around since 1990. (App. 22, Tr. p. 64.) TMC built a hotel on its

property and injured workers are put up in the hotel if required to travel to participate in the light duty program. (App. 22, Tr. p. 64-65.) The hotel offers a fitness room, an examination room offering privacy, and a swimming pool. (App. 23, Tr. p. 67.) TMC has a licensed physical therapist that is available on-site, as needed. (App. 22, Tr. p. 65.) Arrangements to purchase groceries and transportation via a company car are also provided as needed. (App. 22-23, Tr. p. 65-66.) Transportation arrangements and costs for drivers to return home every other weekend are provided and paid for by TMC, and travel time does not count towards weekends. (App. 24, 27, Tr. pp. 70, 82-83.)

As indicated by the district court, there is was no evidence cited by acting Commissioner Walshire suggesting the light duty work offered by TMC did not meet Neal's medical restrictions. (App. 296.) Therefore, the suitable work standard was satisfied in this case. The record is undisputed that Neal refused the light duty work offered by TMC. (App. 194-195.) Accordingly, Neal refused suitable work as that term is used in §85.33 and his healing period benefits were properly suspended by TMC as a matter of law. The acting Commissioner's error in finding otherwise was properly reversed by the district court and this Court should affirm.

Neal argues that the district court's interpretation of Iowa Code §85.33(3) is too broad because it does not require the employee to be happy with the hours, pay,

etc. Neal exaggerates the actual experiences he would have if he participated in TMC's light duty program. First, Neal suggests that he refused light duty work with TMC because he would be forced to live in a hotel with two other men, would only be able to return home every two weeks and would be torn away from his treating physician and family. (Pl. Br. p. 10.) There is simply no support in the record for Neal's assertions.[1] While Neal testified he had to share a room with two other men during his training period (App. 16, Tr. p. 41), Ms. Grice testified that generally light-duty workers are in a room by themselves, and only in the event of an overflow would they be asked to share a room. (App. 25, Tr. p. 77.) Neal also argues that participation in the light-duty program would have torn him away from his treating physician. (App. 9, Tr. p. 12.) The undisputed evidence at hearing established that Neal would not have been "torn away" from his treating physician if he accepted light duty work. Specifically, Ms. Grice testified that TMC's policy is to keep injured workers under the care of their treating physicians. (App. 24, Tr. p. 70.) Accommodations are made by TMC to allow light-duty workers to receive the care they need from the treating physician who has been providing the care for the work injury. (App. 24, Tr. p. 70.)

As found by the district court, even assuming *arguendo* that the term "suitable work" has reference to work that is suitable to the employee personally,

[1] Neal's Brief contains no citations to transcript pages or specific exhibits in violation of Rule of Appellate Procedure 6.903(g)(3) and 6.904(4). As a result, it was impossible for the undersigned to comprehend what parts of the record Neal is relying on.

the acting Commissioner's finding that the light duty work offered to Neal in this case did not meet such a standard is not supported by substantial evidence. (App. 297.) Neal initially agreed to come to Des Moines. (App. 16, Tr. p. 38.) Neal's reasons for changing his mind were multiple and varied, including that he did not want to work as a "snitch," that he would not be making enough money (App. 126, Neal Dep. p. 70), that he needed to do physical therapy close to where his doctor was located (even though it was a 100 mile drive), and Grice had aggravated him. (App. 16-17, Tr. p. 40, 43.) Even acting Commissioner Walshire acknowledged Neal's reasons why he refused the offered light duty work lacked credibility (App. 195-196); they cannot rationally be considered as providing substantial evidence. At least, because there were competing accounts of Neal's refusal to accept the light duty work offered by TMC, the Commissioner had the responsibility to weigh the evidence and consider its credibility in deciding this issue. See Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 273 (Iowa 1995). Acting commissioner Walshire failed to do this.

The acting Commissioner's conclusion that the light duty work offered by TMC was not shown by TMC to be suitable is irrational, illogical and wholly unjustifiable application of law to fact and was properly rejected by the district court. There is no basis in the statutory language for imposing on the employer the burden of proving that the work is personally suitable to the injured worker, in

addition to having to prove that the work is consistent with the injured worker's temporary disability. Such represents an impossible burden for the employer to meet, even where, as in this case, TMC presented ample evidence as to the numerous features of its light duty program that are designed to be accommodating of their employees' personal needs, that the program has an established history of meeting the needs of numerous other injured drivers, and that the light duty work is otherwise reasonable. (App. 22-24, 27, Tr. pp. 64-70, 82-83; App. 154; App. 123, Neal Dep. p. 58).

The burden of proof used by the acting Commissioner is wholly unjustifiable because it unfairly rewards an employee where, as here, the reason why the work was deemed to be unsuitable was not an actual, substantial motivating reason why the light duty work was refused. This is contrary to the intent of the statute. Further, the burden of proof scheme that the acting Commissioner employed in this case is contrary to the burden shifting framework that has been consistently used by the agency in other cases involving Iowa Code Section 85.33(3). The agency's standard burden of proof framework is that, upon the employer's showing that the light duty work offered the injured worker is consistent with the worker's disability, the burden shifts. The employee then must show nonetheless, the light duty work is unsuitable. Gienau v. Iowa Metal Spinners, Inc., File No. 5015052 (Arb. Feb. 23, 2006) (citing Lange v. Crestview Acres, File No. 5002953 (App.

Dec. 27, 2005)) ("However, not every employment situation that is consistent with the employee's disability will necessarily be 'suitable work.' If the work is consistent with the employee's disability, the employee has a burden of showing it to be otherwise unsuitable."); see also McCormick v. North Star Foods, Inc., 533 N.W.2d 196, 197 (Iowa 1995) (implying the analysis is first, did the employer offer suitable work as contemplated in the statute, and second, was the employee's refusal of light duty work unreasonable).

The Appeal Decision basically cart blanche found that TMC's light duty program is unsuitable for any injured employee who does not live within driving distance to Des Moines, Iowa. Such a finding is patently unfair to TMC and similarly situated trucking companies. The nature of the trucking companies' business lends itself to hiring a geographically diverse workforce. Also, Neal and similarly-situated workers who chose to work for Iowa-based trucking companies should anticipate participating in certain activities in Iowa. Holding out-of-state drivers exempt from TMC's light duty program is inconsistent with Iowa's workers' compensation scheme. It is therefore of utmost importance that this Court step in and affirm the district court's ruling that Neal was offered suitable employment via TMC's light duty program.

In sum, the light duty work offered by TMC was suitable and Neal failed to

come forward with sufficient evidence to prove he was otherwise justified in refusing the work. It is apparent that TMC's light-duty program, which has been around for 20 years, satisfies the suitable work requirement in Iowa Code §85.33(3) and Neal failed to offer any justifiable reason why he refused to participate. This Court should find that TMC, through its light duty program, did in fact offer suitable employment to Neal which he unjustifiably refused. The opinion of the district court must be affirmed.

CROSS APPEAL

C. THE AGENCY ERRED IN AWARDING 60 PERCENT INDUSTRIAL DISABILTY TO NEAL BECAUSE SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THAT HIGH OF AN AWARD AND THE AWARD IS THE RESULT OF IRRATIONAL, ILLOGICAL AND WHOLLY UNJUSTIFIABLE APPLICATION OF LAW TO FACT.

The district court held that viewing the record as a whole, a neutral, detached, and reasonable person would conclude that the evidence was substantial to establish a 60 percent industrial disability. (App. 243.) In reaching that conclusion, however, the district court failed to engage in an intensive review of the record to ensure that the Commissioner's fact finding itself is reasonable. Had the district court engaged in an intensive review of the record, it would have been apparent that acting commissioner Walshire's fact finding was unreasonable, and not supported by substantial evidence.

With respect to the Commissioner's written decision, Iowa Code §17A.16(1)

provides: "The [agency] decision shall include an explanation of why the relevant evidence in the record supports each material finding of fact. . . . Each conclusion of law shall be supported by cited authority or by a reasoned opinion." See Schutjer v. Algona Manor Care Ctr., 780 N.W.2d 549, 561-62 (Iowa 2010). This duty on the part of the agency is intended to allow a reviewing court "to ascertain effectively whether or not the presiding officer actually did seriously consider the evidence contrary to a finding, and exactly why that officer deemed the contrary evidence insufficient to overcome the evidence in the record supporting that finding." Schutjer, 780 N.W.2d at 562 (citing Arthur E. Bonfield, Amendments to Iowa Administrative Procedure Act, Report on Selected Provisions to Iowa State Bar Association and Iowa State Government, 42 Rptr. cmt. (1998); Catalfo v. Firestone Tire & Rubber Co., 213 N.W.2d 506, 510 (Iowa 1973) ("[The commissioner's] decision must be sufficiently detailed to show the path he has taken through conflicting evidence. When he disregards uncontroverted expert medical evidence he must say why he has done so.")); see also Tussing v. George A. Hormel & Co., 417 N.W.2d 457, 458 (Iowa 1988) (finding commissioner's failure to state any reasons for rejecting overwhelming evidence, including medical evidence, that work-related injury occurred on date in question required reversal).

The requirement that the commissioner explain his decision is not intended to be onerous:

> [T]he commissioner's decision must be "sufficiently detailed to show the path he has taken through conflicting evidence," [but] the law does not require the commissioner to discuss each and every fact in the record and explain why or why not he has rejected it. Such a requirement would be unnecessary and burdensome.

Catalfo, 213 N.W.2d at 510; see also Bridgestone/Firestone v. Accordino, 561 N.W.2d 60, 62 (Iowa 1997) (stating commissioner's duty to furnish a reasoned opinion is satisfied if "'it is possible to work backward . . . and to deduce what must have been [the agency's] legal conclusions and [its] findings of fact'" (quoting Norland v. Iowa Dep't of Job Serv., 412 N.W.2d 904, 909 (Iowa 1987)); Ward v. Iowa Dept. of Transp., 304 N.W.2d 236, 238 (Iowa 1981).

The findings of fact set forth in the Appeal Decision repeat verbatim the findings of fact set forth in the Arbitration Decision. (App. 166-168, 192-196.) Further, in the Conclusions of Law sections pertaining to industrial disability, the analyses in the Arbitration Decision and Appeal Decision are identical, until the determinative paragraph is reached on page 6. Even then, the analyses are not grossly different. Only the amount of permanent disability benefits ultimately awarded is grossly different. The monetary difference between the two awards is $137,154.

Acting Commissioner Walshire was required to "base his factual determinations on substantial evidence and properly apply the pertinent legal

principals to those facts." Holland v. Shaeffer Pen Corp., 722 N.W.2d 419 (Table), 2006 WL 2522152 (Iowa 2006) (citing Finch v. Schneider Specialized Carriers, Inc., 700 N.W.2d 328, 332 (Iowa 2005)). Iowa Code §17A.19(10) "reaffirms the notion that courts must not 'simply rubber stamp the agency for fact finding without engaging in a fairly intensive review of the record to ensure that the fact finding itself is reasonable." Wal-Mart Stores, Inc. v. Caselman, 657 N.W.2d 493, 498 (Iowa 1998) (quoting Arthur E. Bonfield, Amendments to Iowa Admin. Procedure Act, p. 58 (1998)).

Industrial disability compensates loss of earning capacity as determined by an evaluation of the injured employee's functional impairment, age, intelligence, education, qualifications, experience and ability to engage in employment for which the employee is suited. Second Injury Fund of Iowa v. Shank, 516 N.W.2d 808, 813 (Iowa 1994). The focus is on the ability of the worker to be gainfully employed and rests on comparison of what the injured worker could earn before the injury with what the same person can earn after the injury. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258, 266 (Iowa 1995). Claimant's motivation to return to work is properly factored into this equation. IBP, Inc. v. Al-Gharib, 604 N.W.2d 621, 633 (Iowa 2000).

Permanent benefits and temporary benefits under workers' compensation law are very different; temporary benefits compensate the employee for lost wages

until he or she is able to return to work, whereas permanent benefits compensate either a disability to a scheduled member or a loss of earning capacity. Mannes v. Fleetguard, Inc., 770 N.W.2d 826 (Iowa 2009). In a determination of industrial disability, the focus is not solely on what the claimant can or cannot do; the focus is on the ability of the claimant to be gainfully employed. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996). Acting commissioner Walshire had a duty to examine all testimony bearing on relevant factors in determining the degree of disability and to determine the credibility of such testimony; reasons must be given to reject material evidence. Hartman v. Clarke County Homemakers, 520 N.W.2d 323 (Iowa App. 1994).

The Arbitration Decision and the Appeal Decision both make note of Neal's "minor residual discomfort" and loss of lifting capacity and formal impairment ratings... . (App. 171, 197.) The Arbitration Decision characterizes these as showing "actual industrial loss" while the Appeal Decision characterizes these as showing "significant industrial loss." Id. The Arbitration Decision goes on to find that Neal "could continue to drive over-the-road, but realistically wishes to avoid flatbed trucks with attendant tarping duties. Neal could well still function as a construction supervisor, but probably not as a construction carpenter." (App. 171.) In variance with the Arbitration Decision, the Appeal Decision concludes that "claimant's age [47] would make retraining difficult. . . . He is unable to return

to flatbed truck driving, the type of work for which he is best suited given his work history. He cannot return to any driving duties that would require heavy or medium lifting. His limitations prevent a return to construction, other than as a non-working supervisor." (App. 197.) Acting Commissioner Walshire's fact finding is not reasonable.

There is nothing in the record to indicate it would be difficult for Neal to be retrained. Neal successfully worked as a construction superintendent and testified at hearing he could return to that job earning $50,000 to $55,000 annually. (App 18, Tr. p. 47.) Further, assessing Neal's resulting industrial disability as "significant" or as much as 60 percent is unreasonable given that, as the Appeal Decision points out, Neal has only "minor residual discomfort," and his loss of functional capacity is limited to no lifting more than 40 pounds floor to waist. (App. 192, 197.) Additionally the medical experts concluded Neal's upper extremity impairment is between three percent (Dr. Berg) and eight percent (Dr. Johnson). (App. 81, 103.) Also, Neal's own hearing testimony demonstrates that he has good use of his right arm, except he has trouble lifting heavier weights. (App. 17-18.) According to the FCE, Neal has no other limitations with regard to carrying, pushing/pulling, climbing, standing, sitting. (App. 95.)

The medical evidence demonstrates that Neal is capable of returning to over-the-road trucking. Dr. Johnson, Neal's treating physician, relied on Neal's FCE

results in finding that Neal was capable of returning to over the road driving. (App. 81, 196,) Acting commissioner Walshire relied on the FCE finding in determining the date Neal's healing period ended. (App. 196.) Notwithstanding, acting Commissioner Walshire's decision fails to give due consideration to Neal's ability to be gainfully employed. Ciha, 522 N.W.2d at 143. There is no evidence that Neal's actual earning capacity has been significantly affected by his minor discomfort and lifting restrictions. There is no basis for the acting Commissioner's finding that the inability to work with flat bed trucks causes a significant industrial disability, or that the lifting restrictions are a significant impediment to obtaining non-flatbed truck driving work. In fact, Neal's own testimony supports the contrary, i.e., that the inability to drive flatbed trucks is not significant because he is freely able to return to truck driving and there are many truck driving positions available that he could successfully perform involving vans, tankers or other trailers that do not involve tarping. (App. 18, Tr., p. 46.) There is nothing in the record to suggest there is any economic difference between being employed as a flatbed truck driver versus a tanker truck driver or a refrigeration truck driver. Neal is definitely capable of obtaining a trucking job, and he undoubtedly admitted that there is no shortage of trucking jobs. (App. 18, Tr. p. 46.)

Further, the record lacks any evidence establishing Neal requires retraining in order to be gainfully employed and such a finding is at odds with Neal's

testimony that he could return to jobs he had prior to becoming employed by TMC -- a pumper in an oil field and a construction project superintendent, with an income potential of $50,000 to $55,000 per year. (App. 111, Neal Dep. pp. 10-11; App. 11, Tr. pp. 19-20; App. 105-106.) At the time of hearing, Neal had been applying for jobs as an oil pumper, a position that involves maintenance of equipment necessary to get oil out of the ground, to storage tanks, into the pipeline and to the refinery. (App. 13, 18, Tr. p. 25, 46; App. 105-106.) There is no logical explanation for acting commissioner Walshire's finding that Neal suffered a 60 percent industrial disability when Neal admitted himself he could return to every job he maintained prior to the work injury, with the exception of working as a flatbed driver in order to refrain from climbing and tarping loads. (App. 11, Tr. p. 21.)

The 60 percent award is unsupported and excessive when also considering the clear, undisputed evidence that Neal lacks motivation to return to work. Motivation to return to the job force is a factor to be considered in determining industrial disability. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 192 (Iowa 1980). Neal had a burden to demonstrate he made a reasonable effort to secure employment. Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985) ("It is normally incumbent upon an injured [worker], at a hearing to determine loss of earning capacity, to demonstrate a reasonable effort to secure employment in the

area of ... residence."). Our cases make clear that the burden of persuasion on the issue of industrial disability always remains with the worker. Id. (citations omitted). Despite his admission as to his capability and experience for obtaining employment, when Neal was deposed in late 2008, he had made no effort to find employment beyond "browsing" the county newspaper. (App. 110-111, Neal Dep. pp. 8-10.) It was not until almost immediately before hearing that Neal actually began looking for work. (App. 11, Tr. pp. 19-20; App. 105-106); see also (App. Dec. p. 3) ("Neal is currently unemployed, but did not start looking for work until three weeks prior to the date of hearing"). Neal voluntarily chose not to obtain truck driving work for personal reasons because he no longer wants to work in a job that requires him to be away from home for extended periods of time. See Damiano v. Universal Gym Equipment, 2001 WL 427566 (Iowa App. 2001). At age 48, Neal could be retrained if he would make the effort.

Reviewing the record as a whole, it "evidences a lack of motivation [by Neal] to seek active employment . . . ." Doerfer Div. of CCA v. Nicol, 359 N.W.2d 428, 437 (Iowa 1984) (noting commissioner's reliance on employee's "complete lack of motivation" in obtaining employment). Neal's work injury did not prevent him from looking for work prior to hearing, yet he chose to remain idle. No reasonable person, after giving adequate consideration of the lack of motivation, could conclude Neal suffered a significant, 60 percent loss of earning

capacity.

The Appeal Decision does not include a sufficient explanation supporting the factual conclusions and resolution of conflicting evidence as to the extent of Neal's industrial disability. The acting Commissioner's opinion does not express the step-by-step reasoning that led him to the conclusion that Neal suffered a significant industrial disability. It is not possible to work backward and to deduce what evidence Neal produced relevant to the extent of his loss of earning capacity that led to the conclusion that he suffered a significant, 60 percent industrial disability. For example, there is no evidence that supports the acting Commissioner's finding that Neal is "best suited" for flat-bed truck driving as opposed to van or tanker truck driving. Even if Neal were "best suited" for flat-bed truck driving, Neal's own testimony establishes that it makes little or no difference on his ability to obtain a truck driving job. (App. 18, Tr. p. 46.) What evidence supports that Neal's lifting restrictions pose a significant impediment to obtaining truck driving work where Neal's own testimony is clearly to the contrary? What evidence supports that an inability to do hands-on carpentry work significantly impacts claimant's earning capacity, when he has not done that work in more than twenty years and, by his own admission, will likely be able to return to work in a better paying position as a project manager once he is motivated to do

so? Nothing is discussed and no substantial evidence in the record supports these determinations.

It is not possible to determine from the Appeal Decision what evidence the acting Commissioner considered and why he credited some of this evidence over other, conflicting evidence. The decision was not sufficiently detailed to verify that the acting Commissioner seriously considered any of the substantial evidence against a finding of significant industrial disability, including Dr. Berg's opinion that Neal needs no restrictions, the FCE result that Neal is capable of functioning in the light-medium category of work, and Neal's lack of motivation and lack of credibility.

Given the disparity between the amounts ultimately awarded, a meaningful explanation is called for. See, e.g., Fogle v. Pella Corp., 752 N.W.2d 453 (Table) 2008 WL 2038798 (Iowa App. 2008) (claimant appealed from the commissioner's decrease of the claimant's disability from permanent total to 40 percent, and the court of appeals closely scrutinized the appeal decision and concluded it contained appropriate and sufficient explanation). In this case, the shocking increase in the amount of the industrial disability award – after an almost identical recitation of facts and law – compels the need for the agency to provide a meaningful explanation. Otherwise, it gives the strong appearance that the agency is acting arbitrarily and capriciously in imposing significant liability on the employer. In

this case, this appearance is reinforced by the absolute refusal of acting commissioner Walshire to address any of the points TMC raised in its motion for reconsideration. (App. 207.)

Further, the Appeal Decision represents an illogical, irrational and wholly unjustifiable application of law to the facts. In addition to failing to adequately consider and assess the competing evidence showing Neal's industrial disability was on the order of 15 percent as Deputy Rasey found, the Appeal Decision fails to give any deference to the credibility findings that were expressly and impliedly made by Deputy Rasey. This is totally inconsistent with the agency's standard practice on appeal. In 77 appeal cases decided by Deputy Walshire over the past three years, the following verbiage was used:

> While I performed a de novo review, I must give considerable deference to findings of fact that are impacted by the credibility findings, expressly or impliedly, made by the deputy who presided at the hearing. The deputy who presided at the hearing had the best opportunity to evaluate the demeanor of the persons who testified at the hearing. The presiding deputy has the ability to include the demeanor of a witness when weighing credibility to find the true facts of the case. My ability to find the true facts that are affected by witness demeanor and credibility cannot be expected to be superior to that of the deputy who presided at the hearing. If anything, my ability when reviewing a transcript is likely inferior because I do not have the tool of witness demeanor to use in my evaluation.

See e.g., Reid v. Second Injury Fund, File No. 5022844 (June 30, 2010); Gray v. Rolling West, Ltd., File No. 5024924 (April 16, 2010); Mefferd v. Caretech, Inc., File No. 5025538 (April 9, 2010); Yanovsky v. O'Halloran Int'l, Inc., File No. 5025693 (April 9, 2010); Garcia-Diaz v. Swift Pork Co., File No. 5025201 (April 8, 2010); O'Campo v. Heinz USA, File No. 5021162 & 1163 (March 25, 2010); Manning v. ABCM Corporation d/b/a Harmony House Care Ctr., File No. 5025391 (March 25, 2010).

Deputy Rasey's award of 15 percent industrial disability is consistent with the record and should be reinstated. Neal's functional impairment ratings for his upper extremity ranged from two percent (by Dr. Berg) to eight percent (by Dr. Johnson). (App. 81, 103.) The FCE performed on November 6, 2008, concluded that Neal had the ability to return to substantially similar employment. (App. 93-94.) Neal himself admitted that even with his restrictions, he was qualified physically and by experience, to return to the work he had performed in the past. He admitted he could return to over-the-road truck driving, except for driving a flat-bed. (App. 118, Neal Dep., p. 41; App. 18, Tr. p. 46.) Neal acknowledged there were many truck driving positions available that involve vans or trailers other than flatbeds. (App. 18, Tr. p. 46.) He further acknowledged that his past skills and experience made him marketable, including work as a construction project

superintendant or as a pumper in the oil industry. (App. 111, Neal Dep. pp. 10-11; App. 11, 13, Tr. pp. 19-20, 26-27.)

This Court should reverse the district court's ruling affirming acting commissioner Walshire's determination that Neal suffered a 60 percent industrial disability as a result of his work related shoulder injury. Acting commissioner Walshire's Appeal Decision is based on unreasonable fact finding, is arbitrary and is not supported by substantial evidence.

CONCLUSION

The district court's interpretation of Iowa Code §85.33(3) must be affirmed. This Court should rule as a matter of law that Neal is not entitled to temporary benefits during his refusal to accept suitable work consistent with his disability. Further, the acting Commissioner's determination that Neal suffered a 60 percent industrial disability is not supported by substantial evidence and must be reversed. The reasoning supporting that determination is not adequately explained in the Appeal Decision and requires remand. That issue should be remanded to the Commissioner for rehearing and redetermination of the extent of Neal's industrial disability.

ORAL ARGUMENT

Appellee/Cross Appellant hereby makes a request to be heard in oral argument.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date indicated below, a true copy of the foregoing instrument was served upon all parties of interest by enclosing the same in an envelope addressed to each party at their respective address as disclosed on the service list appended hereto by:

X U.S. Mail	___ Fax
___ Hand Delivery	___ Overnight Courier
___ Certified Mail	___ Other

I certify under penalty of perjury that the foregoing is true and correct. Executed on this 6 day of May, 2011, in Cedar Rapids, Linn County, Iowa.

Ethel Winger

Certificate of Compliance With Type-Volume Limitation

1. This brief complies with the type-volume limitation of Iowa Rule of Appellate Procedure 6.903(1)(g)(1) because it contains 9,488 words, excluding the parts of the brief exempted.

2. This brief complies with the typeface requirement of Iowa Rule of Appellate Procedure 6.903(1)(e) because it has been prepared in proportionately spaced typeface using Microsoft Word 2007 in Times New Roman 14 point type.

By: Sasha L. Monthei

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